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Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1379

EARL L. WATTS,
Petitioner in Certiorari

vs.

WINTON TEAGLE ET AL,
Defendants in Certiorari

PETITION OF EARL L. WATTS FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA.

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Supreme Court of the United States

OCTOBER TERM, 1971

No. _____

EARL L. WATTS,

Petitioner in Certiorari

vs.

WINTON TEAGLE, J. E. HUGHES, MRS. J. C. HANSON, JACK ROBERTSON, ODELL CLEMENTS, W. H. O'KELLEY, CURLESS LOWRY, MRS. LUCILLE CRENSHAW, GERALD CLAYTON, individually and as Trustees of the Avondale United Methodist Church, a corporation, MRS. J. R. WALLACE, as Treasurer of the Avondale United Methodist Church, a corporation, and REV. R. C. SINGLETON, individually,

Defendants

PETITION OF EARL L. WATTS FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Earl L. Watts files this his petition for writ of certiorari to the Court of Appeals of Georgia for the purpose of having reviewed, corrected, and reversed, its decision and judgment of October 21, 1971 (***Watts vs. Teagle et al, 124 Ga. App. 726***) affirming the summary judgment of Judge Richard A. Thibadeau of the Superior Court of DeKalb County, Georgia, for the defendants in his action for damages for fraud and deceit practiced upon him by the defendants.

CONCISE STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

The decision of the Court of Appeals of Georgia sought to be reviewed was rendered by that Court on October 21, 1971 and is reported in ***Watts vs. Teagle et al, 124 Ga. App. 726***, a copy of which is attached as Petitioner's Exhibit A. Petitioner filed a motion for a rehearing in that court on October 26, 1971, which was denied on October 29, 1971. He filed with the Supreme Court of Georgia a petition for writ of certiorari to the Court of Appeals of Georgia, which was denied on December 1, 1971, a copy of which denial is attached as Petitioner's Exhibit B. He filed a Motion for Reconsideration with the Supreme Court of Georgia, which was denied on December 17, 1971, a copy of which denial is attached as Petitioner's Exhibit C. He filed a Motion with the Court of Appeals for a Stay of the remittitur in this case pending application to the Supreme Court of the United States for a writ of certiorari to the Court of Appeals of Georgia and it was granted on December 30, 1971, a copy of which Stay is attached as Petitioner's Exhibit D.

The Court of Appeals of Georgia is, therefore, the highest court of Georgia in which a decision in this case could be had.

Petitioner submitted to Honorable Lewis F. Powell, Associate Justice of the Supreme Court allotted to the Fifth Circuit, an application for an extension of time of forty-five days from March 16, 1972 in which to file a petition for writ of certiorari with this court, and it was granted by Mr. Justice Powell on March 7, 1972.

Petitioner contends that the decision of the Court of Appeals of Georgia in affirming the summary judgment of Judge Richard A. Thibadeau of the Superior Court of DeKalb County, Georgia for the defendants, in his action for damages for fraud and deceit practiced upon him by the defendants, unless reversed by this court, would deprive petitioner of his property to the extent of the amount sued for by him, by depriving him of Due Process of Law and of Equal Protection of the Law granted to other persons in like circumstances and similar situations, in violation of Article I, Section I, Paragraphs I, II, III, IV, and XXIII, and Article VI, Section XVI, Paragraph I of the Constitution of Georgia as applied to the States by Section I of Amendment XIV of the U.S. Constitution, and in violation of Amendment V of the U.S. Constitution as applied to the States by Section I of Amendment XIV thereof.

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is Section 1257 (3) of Title 28, U. S. Code, reading in part as follows: "Final judgments or decrees rendered by the highest court of the State in which a decision could be had, may be reviewed by the Supreme Court as follows:*** (3) By writ of certiorari where any title, right, privilege or immunity is specially set up or claimed under the Constitution *** of *** the United States."

QUESTIONS PRESENTED FOR REVIEW

Whether the decision of the Court of Appeals of Georgia of October 21, 1971, unless reversed by this Court, will deprive petitioner, a citizen of Georgia and of the United States, of his property to the extent of the amount sued for by him, by depriving him of Due Process of Law and of Equal Protection of the Law granted to other persons in like circumstances and similar situations in violation of Article I, Section I, Paragraphs I, II, III, IV, and XXIII and Article VI, Section

XVI, Paragraph I of the Georgia Constitution as applied to the States by Section I of Amendment XIV of the U. S. Constitution, and in violation of Amendment V of the U. S. Constitution as applied to the States by Section I of Amendment XIV thereof, in the following particulars:

1. In upholding Judge Richard A. Thibadeau in arbitrarily and capriciously rendering, in violation of Section I of Amendment XIV of the U. S. Constitution, the summary judgment on March 18, 1971 in favor of all the defendants and in dismissing Petitioner's complaint as amended, when the pleadings and affidavits submitted by the parties presented questions of fact for the exclusive determination of a jury under Article VI, Section XVI, Paragraph I of the Georgia Constitution as applied to Georgia by Section I of Amendment XIV of the U. S. Constitution.

2. In upholding Judge Richard A. Thibadeau in arbitrarily and capriciously depriving Petitioner of Due Process of Law and of Equal Protection of the Law granted to other persons in like circumstances and similar situations by depriving him of a Jury trial of all questions of fact presented by the pleadings and affidavits in the case, in violation of Article VI, Section XVI, Paragraph I, and Article I, Section I, Paragraphs I, II, III, IV, and XXIII of the Georgia Constitution and of Amendment V of the U. S. Constitution as applied to Georgia by Section I of Amendment XIV thereof.

3. In upholding Judge Richard A. Thibadeau in exercising at the same time legislative, judicial, and executive powers of the State of Georgia in violation of Article I, Section I, Paragraph XXIII of the Georgia Constitution as applied to Georgia by Section I of Amendment XIV of the U. S. Constitution, in granting a summary judgment for the defendants and in dismissing the complaint of petitioner as amended, when the facts and circumstances shown by the pleadings and affidavits in the case presented questions of fact for the exclusive determination of a jury under Article VI, Section XVI, Paragraph I of the Georgia Constitution as applied to Georgia by Section I of Amendment XIV of the U. S. Constitution.

4. In upholding Judge Richard A. Thibadeau in not holding that the pleadings and affidavits submitted by the parties presented questions of fact and circumstances as to whether the defendants had conspired and successfully acted to prevent petitioner from exercising his option to purchase the property described in said option after inducing him to make substantial improvements thereon at his expense with the deliberate intention of preventing him from exercising said option, thereby depriving him of his property in the amount sued for in violation of Article VI, Section XVI, Paragraph I, and Article I, Section I, Paragraphs I, II, III, IV, and XXIII of the Georgia Constitution as applied to Georgia by Section I of Amendment XIV of the U. S. Constitution, and in violation of Amendment V of the U. S. Constitution as applied to Georgia by Section I of Amendment XIV thereof.

CONCISE STATEMENT OF THE CASE CONTAINING THE FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED.

Petitioner filed a verified complaint in the Superior Court of DeKalb County, Georgia, on August 19, 1970 against the defendants in two counts for injuries and damages. In Count One he alleged that the defendants had injured and damaged him in the sum of $179,500.00 by conspiring and successfully acting to prevent him from exercising his option to purchase the Avondale United Methodist Church property described in his option to purchase the same. In Count Two he alleged that the defendants were guilty of deliberate, fraudulent, and deceitful acts toward him with the intention of defrauding him and which did defraud him by preventing him from exercising his option to purchase said property. He sued under Count Two for general damages in the amount of $175,000.00; $4,500.00 for improvements made by him on said property; $5,000.00 for attorney's fees; and $25,000.00 as Punitive damages.

Petitioner filed a verified amendment to his complaint on October 26, 1970 in which he alleged in part and in substance as follows:

COUNT I

Beginning in March, 1970 and continuing through the remaining period of the option, the defendants deliberately refused to allow him to exercise his option by refusing to allow him to purchase the property involved for the sale price specified in said option. The defendants acted in concert with each other in preventing petitioner from exercising his said option. That the defendants from time to time from March, 1970 through August 19, 1970 refused to convey said property to him for the purchase price specified in said option.

COUNT II

From time to time beginning March, 1970 and continuing throughout the remaining period of the option, the defendants deliberately refused to allow petitioner to exercise his said option by refusing to allow him to purchase property involved for the sale price specified therein. The defendants from time to time from March, 1970 through August 19, 1970 refused to convey said property to petitioner for the purchase price specified in said option. The defendants acted in concert with each other in preventing petitioner from exercising his said option. The defendants, individually and collectively, are guilty of fraud and deceit toward petitioner in that they accepted $2,000.00 from him for the option and allowed him to spend over $2,500.00 in improving the property and over $1,000.00 in advertising the same for sale, when they knew they did not intend to allow him to purchase the property for the purchase price of $150,000.00 specified in said option and intended instead to prevent him from doing so and to prevent him from selling said property to customers ready, willing and anxious to buy the same, which he produced from time to time beginning in March, 1970 and extending through the remainder of the period of said option. The improvements petitioner made on said property greatly

increased its value and intensified the efforts of the defendants to prevent petitioner from exercising his option to purchase the property or to sell it during the period of said option. Plaintiff seeks and is entitled to the sum of $175,000.00 general damages, $2,000.00 for the amount he paid for the option, $2,500.00 for cost of improvements he made on said property, $1,000.00 for advertising the property, $25,000.00 for expenses of litigation, including attorneys' fees, and $50,000.00 punitive damages. The defendants have acted in bad faith toward petitioner and as the result thereof he is entitled to recover of them all expenses of litigation, including counsel fees, which will amount to at least $25,000.00. He seeks and is entitled to recover said punitive damages by reason of the aggravating circumstances, either in the acts or the intentions of the defendants, to either deter them from repeating their said trespass or as compensation for the wounded feelings of the plaintiff.

The defendants filed on September 11, 1970 their answer to petitioner's complaint, in which they denied they had injured and damaged petitioner but admitted "the option price (of the property involved) was $150,000.00." The defendants filed on the same day a Request for Genuineness of Document and Admission of Facts, attaching thereto a copy of the option in question. On September 24, 1970 petitioner filed an answer to said request of defendants, in which he admitted that the Exhibit A attached by the defendants to said Request was a copy of the option agreement entered into on February 19, 1970 between him and the defendants, but denied other allegations set forth in said request. Petitioner attaches hereto as his Exhibit E a copy of said option agreement.

On September 25, 1970 the defendants filed a motion for summary judgment in their behalf. On October 26, 1970 petitioner filed an amendment to his complaint as aforesaid

setting forth in more particularity the manner in which the defendants conspired and successfully acted to prevent him from exercising his right to purchase the property in question under the terms of said option agreement with the defendants. On October 26, 1970 petitioner filed a motion for a continuance of the hearing on the motion of defendants for summary judgment set for a hearing on that date at 10:00 A.M. The said continuance was granted and the motion of the defendants for summary judgment was reset for a hearing at 10:00 A.M. on March 18, 1971.

On March 11, 1971 Petitioner filed his motion to dismiss the motion of defendants for a summary judgment in their behalf and attached thereto as his Exhibits A and B affidavits from Judson B. Ackerman and Leonard M. Duke supporting the allegations in his verified petition as amended. He contended in his said motion that the grant of a summary judgment to the defendants would violate Amendments V and IX of the United States Constitution as applied to the States by Section I of Amendment XIV thereof. Petitioner's counsel, Mr. E. B. Shaw, attempted to read and argue his said motion and affidavits in support thereof on March 18, 1971 (the date set for the hearing), but was prevented from doing so by Judge Thibadeau, who thereupon entered a summary judgment for the defendants and dismissed petitioner's complaint as amended.

Petitioner appealed to the Court of Appeals of Georgia on March 18, 1971 from the order of Judge Richard A. Thibadeau of March 18, 1971 granting a summary judgment for all the defendants and dismissing his complaint as amended, upon the ground that Judge Thibadeau committed the following reversible errors of a fatally prejudicial nature to him in this case:

1. In holding "that there is no genuine issue as to any material fact and defendants are entitled to a judgment as a matter of law."

2. In ordering and adjudging that the motion for summary judgment in favor of all the defendants be, and it is hereby granted and plaintiff's complaint, as amended, is hereby dismissed.

3. Deprived plaintiff of a jury trial as to all questions of fact presented by the pleadings, which alleged that defendants had conspired and acted to prevent the exercise of said option, and affidavits in support thereof, in violation of Article VI, Section XVI, Paragraph I of the Georgia Constitution.

4. Judge Thibadeau exercised at the same time legislative, judicial, and executive powers in violation of Article I, Section I, Paragraph XXIII of the Georgia Constitution.

5. Deprived plaintiff of his property to the extent and in the particulars specified in his petition as amended, without Due Process of Law and without Equal Protection of the Law in violation of Article VI, Section XVI, Paragraph I of the Georgia Constitution and Amendment XIV of the U. S. Constitution and Amendment V of the U. S. Constitution as applied to the States by Section I of Amendment XIV thereof.

6. In not holding that the pleadings and affidavits presented by the parties raised material and pertinent questions of fact which under the law and Article VI, Section XVI, Paragraph I of the Georgia Constitution can only be decided by a jury.

7. In not overruling the motion of the defendants for summary judgment in their behalf because the pleadings and affidavits presented and on file in the case raised material questions of fact which under the law of this State and Article VI, Section XVI, Paragraph I of the Georgia Constitution can only be decided by a jury.

8. In not holding that the comparative weight of positive and circumstantial evidence is exclusively and solely for the determination of a jury.

The Court of Appeals of Georgia affirmed the trial court on October 21, 1971 in ***Watts vs. Teagle et al, 124 Ga. App. 726***, a copy of which is attached as Exhibit A.

Petitioner filed a motion for rehearing in the Court of Appeals on October 26, 1971 and again urged the same State and Federal constitutional grounds. It was denied on October 29, 1971.

Petitioner filed a petition with the Supreme Court of Georgia on November 22, 1971 for a writ of certiorari to the Court of Appeals of Georgia to review, correct, and reverse the decision of the latter, and urged the same State and Federal constitutional grounds he urged before the Trial Judge and the Court of Appeals of Georgia. It was denied on December 1, 1971, a copy of said denial being attached as Exhibit B.

Petitioner filed a motion for reconsideration on December 9, 1971 and urged the same State and Federal constitutional grounds which he urged in his said petition for certiorari. It was denied on December 17, 1971. A copy of said denial is attached as Exhibit C.

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI.

The questions involved in this petition for certiorari are substantial and of gravity and importance in that the decision and judgment of the Court of Appeals of Georgia of October 21, 1971 in ***Watts vs. Teagle et al, 124 Ga. App. 726***, unless reversed by this Court, will deprive petitioner, a citizen of Georgia and of the United States, of his property in the amount sued for by him, without Due Process of Law and without Equal Protection of the law granted to other persons in like circumstances and similar situations, in the particulars specified in this petition; in violation of the provisions of the Constitutions of Georgia and of the United States herein specified and especially in violation of Section I of Amendment XIV of the Constitution of the United States.

As pointed out by the Supreme Court of Georgia in *Central of Ga. Ry. Co. vs. Yesbik, 146 Ga. 620, 91 S.E. 873,* this Court has granted the writ of certiorari where "the case involved questions of great public concern or matters of gravity and importance *(Lau Ow Bew, 141 U.S. 583, 12 S.Ct. 43),*" and "where the decision would seriously affect the administration of justice *(Re Chetwood, 165 U.S. 443, 17 S.Ct. 385)* and in similar instances." It CLEARLY APPEARS FROM THIS PETITION THAT THIS CASE QUALIFIES IN ALL OF SAID RESPECTS.

The trial judge states in his order granting summary judgment for defendants and in dismissing the complaint of petitioner that he "considered the pleadings, requests for genuineness of documents and admission of facts and plaintiff's answer thereto, the affidavits and other matters in support of and in opposition of the motion (of the defendants for summary judgment) and after hearing oral arguments thereon, the Court is of the opinion that there is no genuine issue as to any material fact and defendants are entitled to a judgment as a matter of law." It is very obvious, however, from the excerpts presented in this petition from the pleadings and affidavits before the trial judge that there was both positive and circumstantial evidence requiring the exclusive consideration of a jury under Article VI, Section XVI, Paragraph I of the Georgia Constitution as applied to Georgia under Section I of Amendment XIV of the U.S. Constitution, and which would have authorized a jury to find that petitioner had been arbitrarily, capriciously, unjustly, and illegally prevented by overt acts of the defendants from exercising his option to purchase the property involved, pursuant to a conspiracy formed by the defendants after petitioner paid for said option and made substantial improvements on the property. IT HAS ALSO BEEN POINTED OUT IN THIS PETITION THAT THE TRIAL JUDGE ARBITRARILY AND CAPRICIOUSLY REFUSED TO ALLOW MR. E. B.

SHAW AS ATTORNEY FOR PETITIONER TO READ HIS MOTION TO DISMISS THE MOTION OF DEFENDANTS FOR SUMMARY JUDGMENT OR TO ARGUE THE PLEADINGS AND AFFIDAVITS IN OPPOSITION TO SAID MOTION OF DEFENDANTS.

Mr. Shaw also cited and quoted as follows from *Davis vs. Kirkland, 1 Ga. App. 5, 58 S.E. 209:* "Since the birth of Magna Charta - one of the law's leading citizens - whenever internal dissension or revolution arises in the territory of evidence, to determine which contending faction shall be entitled to the jewel truth, she calls in, as sole arbiter to settle the dispute, the jury, who under law's irrevocable appointment shall settle, in every nook and corner of law's protectorate - the domain of facts - all issues, great and small. The wisdom of all men most enlightened, the experience of those most familiar with the practice, the innate sense of justice, all concur in the opinion that disputes between such varying and variable characters as visit and inhabit the domain of facts cannot be satisfactorily adjusted and finally determined by any umpire more absolutely reliable and just than the jury. In the very beginning of its official existence this court desires to place itself on record as standing for the exclusive right of the jury to determine every issue of fact in the trial of every case in Georgia. And we so willingly and cordially follow the decisions of the Supreme Court in *63 Ga. 85 and 89 Ga. 571, 16 S.E. 116* *** THE PARAMOUNT RIGHT OF THE JURY TO DECIDE ANY ISSUE OF FACT IN EVERY CASE IN GEORGIA IS ABSOLUTELY EXCLUSIVE OF ANY SUCH PREROGATIVE ON THE PART OF THE JUDGE. THE EXERCISE OF THIS POWER BY THE JURY, UNLESS WAIVED BY THE PARTIES, IS AN INDISPENSABLE REQUISITE OF A LEGAL TRIAL IN THIS STATE, AND AN INVASION OF THIS RIGHT (as has been held by our Supreme Court times without number) DEMANDS THE GRANT OF ANOTHER TRIAL." (Capitals added).

It appears from the foregoing that petitioner has been arbitrarily and capriciously deprived of his Day in Court by the Courts of Georgia in the particulars briefly specified in this petition in violation of Section I of Amendment XIV of the Constitution of the United States.

In *Hovey vs. Elliott et al, 167 U.S. 409, 17 S.Ct. 841*, this Court held in part: "Perhaps no definition is more often quoted than that given by Mr. Webster in the Dartmouth College Case: 'By the law of the land is most clearly intended the general law; a law which HEARS BEFORE IT CONDEMNS, WHICH PROCEEDS UPON INQUIRY, AND RENDERS JUDGMENTS ONLY AFTER TRIAL. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society.' and that the judicial department of the government is, in the nature of things, necessarily governed in the exercise of its functions by the rule of Due Process of Law, is well illustrated by another observation of Judge Cooley, immediately following the language just quoted, saying: 'THE DEFINITION HERE GIVEN IS APT AND SUITABLE AS APPLIED TO JUDICIAL PROCEEDINGS, WHICH CANNOT BE VALID UNLESS THEY 'PROCEED UPON INQUIRY,' and 'RENDER JUDGMENT ONLY AFTER TRIAL.' *** The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action, and to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends ***. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal. ***" (Capitals added).

In *Erie R. Co. vs. Tompkins, 304 U.S. 64, 58 S.E. 817,* this Court held in part: "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of Federal concern. There is no Federal general common law. Congress has no power to declare substantive rules of common law applicable in a State, whether they be local in their nature or 'general', be they commercial law or a part of the law of torts. And no clause in the constitution purports to confer such a power upon the Federal courts."

The law of Georgia applicable to this case is clearly set forth in the provisions of the Georgia Constitution, the Georgia Code Sections, and the decisions of the Court of Appeals and Supreme Court of Georgia cited in this petition. It is very apparent from this petition that petitioner has been deprived of the application and effect of said law granted to other persons in like circumstances and similar situations, without Due Process of Law and without Equal Protection of the Law in violation of Section I of Amendment XIV of the U. S. Constitution as applied to Georgia.

In the case of *Greene vs. McElroy et al, 360 U.S. 474, 79 S.Ct. 1400,* this court held in part as follows: The requirements of CONFRONTATION AND CROSS-EXAMINATION ARE ESSENTIAL TO DUE PROCESS in both CIVIL and Criminal cases as well as ADMINISTRATIVE AND REGULATORY ACTIONS, and that they find expression in the Sixth Amendment to the U.S. Constitution which provides that in all criminal cases the accused shall enjoy the right "to be confronted with the witnesses against him." It further held in that case, "While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory

might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy."

The summary judgment for the defendants by the trial court as affirmed by the Court of Appeals of Georgia in *Watts vs. Teagle et al, 124 Ga. App. 726*, without allowing petitioner's counsel to present or cross-examine any witnesses or to make any oral argument and without a jury trial as provided by Article VI, Section XVI, Paragraph I of the Georgia Constitution of the questions of fact presented by the verified pleadings and affidavits submitted by petitioner, not only violates Section I of Amendment XIV of the U.S. Constitution but, in the language of the Supreme Court of Georgia in *Swindle vs. Poore, 59 Ga. 337*, is "SO FLAGRANTLY UNJUST AS TO SHOCK THE MORAL SENSE." (Capitals added).

As held by this Court in *Hovey vs. Elliott et al, 167 U.S. 409, 17 S.Ct. 844-5*, "It is a rule as old as the law, and never more to be respected than now, that NO ONE SHALL BE PERSONALLY BOUND UNTIL HE HAS HAD HIS DAY IN COURT, by which is meant until he has been duly cited to appear, AND HAS BEEN AFFORDED AN OPPORTUNITY TO BE HEARD. Judgment without such citation and OPPORTUNITY WANTS ALL THE ATTRIBUTES OF A JUDICIAL DETERMINATION. IT IS JUDICIAL USURPATION AND OPPRESSION, AND CAN NEVER BE UPHELD WHERE JUSTICE IS JUSTLY ADMINISTERED." (Capitals added).

Ga. Code Section 81A-156, dealing with Summary Judgments, provides in sub-paragraph (c): "BUT NOTHING IN THIS SECTION SHALL BE CONSTRUED AS DENYING TO ANY PARTY THE RIGHT TO TRIAL BY JURY WHERE THERE ARE SUBSTANTIAL ISSUES OF FACT TO BE DETERMINED."

Byrd vs. Ford Motor Co. et al, 118 Ga. App. 333, holds in part:

"2. The basic premise of the new Civil Practice Act is that it does away with 'issue pleading' and substitutes 'notice pleading.' In the famous Reynolds case *(Reynolds v. Reynolds, 217 Ga. 234, 246, 123 S.E.2nd 115)* the Supreme Court of Georgia quoted with approval the Supreme Court of the United States: '. . . Under the prior federal practice, the pre-trial functions of notice-giving, issue-formulation and fact-revelation were performed primarily and inadequately by the pleadings. Inquiry into the issues and the facts before trial was narrowly confined and was often cumbersome in method. The new rules, however, restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial.

"A petition should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. ***

"The trial court erred in sustaining the motion to dismiss.

"Judgment reversed. Bell, P. J. and Quillian, J. concur."

Bell v. Atlanta Cooperage Co. Inc. et al, 121 Ga. App. 207, holds in part:

"Pannell, Judge. Under the Civil Practice Act *(Ga.L. 1966, p. 609, as amended; Code Ann. Title 81A)*, a complaint should not be dismissed unless the averments disclose with certainty that the plaintiff would not be entitled to relief under any state of facts which could be proved in support of such claim. *Harper v. DeFreitas, 117 Ga. App. 236, 238 (160 SE2nd 260).* The petition in the present case being amply sufficient to meet the requirements of the Act and not affirmatively disclosing that complainant is not entitled to relief under facts provable

under the allegations made, the trial court erred in sustaining the motion to dismiss. Judgment reversed. Jordan, P. J., and Eberhardt, J., concur."

The following authorities also show that the defendants were not entitled to a summary judgment in their behalf: *Ga. Highway Express, Inc. vs. Alexander Co., 124 Ga. App. 143; Horton et al vs. Nichols, Admr., 117 Ga. App. 748; Few vs. Weeks, Admr., 118 Ga. App. 190; Peacock vs. Adams, 118 Ga. App. 728; Herrington vs. Stone Mountain Memorial Assn., 119 Ga. App. 658; Reighard vs. Ga. Power Co., 119 Ga. App. 640; Garrett vs. Royal Bros. Co., Inc., 225 Ga. 533, reversing Royal Frozen Foods Co., Inc. vs. Garrett, 119 Ga. App. 424; Reid vs. Batson-Cook Co., 122 Ga. App. 803.*

The following authorities support the allegations in Petitioner's verified petition as amended and the facts in his affidavits in opposition to the motion of the defendants for a summary judgment, showing that they were not entitled to said summary judgment because they conspired and successfully acted to prevent petitioner from exercising his option to purchase the property involved for the price and under the terms of said option: *United States vs. Kissel, 218 U.S. 601, 31 S.Ct. 124; Anthony vs. State, 90 Ga. App. 448, 83 S.E. 2nd 217; Chappel vs. State, 209 Ga. 701, 73 S.E. 2nd 417; Brown & Allen et al vs. Jacobs Pharmacy Company, 115 Ga. 429, 41 S.E. 553; Cook vs. Robinson et al, 216 Ga. 328, 116 S.E. 2nd 742; Dye vs. State, 90 Ga. App. 736, 84 S.E. 2nd 116; Goddard vs. Selman et al, 56 Ga. App. 116 (1), 192 S.E. 257; 186 Ga. 103, 197 S.E. 250; Horton vs. Johnson, 192 Ga. 338, 346, 15 S.E. 2nd 605; and Womeco Theatres, Inc. vs. United Artists Corp., 53 Ga. App. 509, 513, 186 S.E. 572.*

As held by this Court in *Hill vs. State of Texas, 316 U.S. 400, 62 S.Ct. 1159,* Equal Protection of the Law is something more than an abstract right. IT IS A COMMAND WHICH THE STATE MUST RESPECT, THE BENEFIT OF WHICH EVERY PERSON MAY DEMAND.

With reference to the refusal of the trial court to allow petitioner's counsel to argue his case, as affirmed by the Court of Appeals of Georgia, special attention is invited to the decision of the Supreme Court of Georgia in *Van Dyke vs. Martin et al, 55 Ga. 467, 470,* holding in part: "ARGUMENT IS NOT ONLY A RIGHT BUT A MATERIAL ONE. It is not a mere ornamental fringe hung upon the border of a trial. Trial, under our system, is a cooperation of minds - a grave and serious consultation over what should be done and how the end should be accomplished. The attorneys in the cause are not mere carriers to bring in materials for constructing the edifice; they have a right, as representing the parties, to suggest where every important stone should be laid, and to assign reasons, drawn from legitimate sources, in support of their suggestions. Their reasons may be good or bad, BUT SUCH AS THEY ARE THEY SHOULD BE HEARD AND CONSIDERED ***." (Capitals added).

In the case of *Garrison vs. Wilcoxson, 11 Ga. 158-9,* the Supreme Court of Georgia held in part: "It is a most valuable right to be represented by learned and eloquent counsel, not only before the Court, as to the law, but also before the Jury, as to the facts. It means something -it is a guarantee against the encroachments of power upon the personal rights of the citizen. So far as the facts are concerned, the privilege is valuable, just because the Jury may look to the argument of counsel - may consider his reasons, before making up their verdict. *** THE DUTIES OF THE ADVOCATE ARE

AMONG THE MOST ELEVATED FUNCTIONS OF HUMANITY. Whilst he is the representative of his client's cause, yet these considerations insure an honorable advocacy. His business is to comment on the evidence - to sift, compare and collate the facts - to draw his illustrations from the whole circle of the sciences - to reason with the accuracy and inspirations of genius, and adorn it with all the attributes of eloquence. ***" (Capitals added).

In *Hudson vs. Best, 104 Ga. 131, 30 S.E. 688*, the Supreme Court of Georgia held that the Comparative weight of Circumstantial and Direct Evidence on any given issue is a question of fact for the determination of the jury.

In *Moody & Wife vs. Davis, 10 Ga. 410*, the Supreme Court of Georgia held in part: "As officers of the Court, the duties of counsel are not in conflict with those which devolve upon him as the representative of a party. THEY ARE THE FRIENDS OF THE COURT, enlisted with him IN THE SUBLIME WORK OF DISCOVERING TRUTH, AND DEALING OUT JUSTICE BETWEEN MAN AND MAN. *** Whilst judgment belongs alone to the Judge - ENLIGHTENMENT IS THE PROVINCE OF THE LAWYER, AND I APPREHEND THAT NO JUDGE CAN BE FOUND SO PRESUMPTUOUSLY VAIN, OR SO FLAGRANTLY UNJUST, AS NOT TO RECOGNIZE, AND THAT TOO WITH GRATEFUL EMOTIONS, THE AID WHICH HE DERIVES, IN THE DISCHARGE OF DUTIES MORE SOLEMN THAN BELONG TO ANY OTHER FUNCTIONARY, FROM AN ABIE BAR. *** It is the duty of the Judge to enforce the laws of the State, made in accordance with the State and Federal Constitutions - THE WHOLE LAW, as it applies, in his judgment, to the cases which come before him. HE HAS NO RIGHT AND NO POWER TO WITHHOLD THE APPLICATION OF ONE SINGLE PRINCIPLE OF LAW, TO A SINGLE CASE OVER WHICH HE HAS JURISDICTION; HE HAS NO DISPENSATION JUSTIFYING OR EXCUSING AN OMISSION TO APPLY THE LAW." (Capitals added).

In *1 Cor. 14:40* we are told to "Let all things be done decently and in order," and in *Jude 3* that we "should earnestly contend for the faith which was once delivered unto the saints."

"Now unto Him that is able to keep you from falling and to present you faultless before the presence of His glory with exceeding joy, To the only wise God our Saviour, be glory and majesty, dominion and power, both now and ever. Amen."

WHEREFORE, Petitioner earnestly and urgently appeals to this Honorable Court to grant a Writ of Certiorari to the Court of Appeals of Georgia to review, correct, and reverse its decision and judgment of October 21, 1971.

Respectfully submitted,

G. SEALS AIKEN,
Attorney for Petitioner
Suite 1626 Candler Bldg.,
Atlanta, Ga. 30303

E. B. Shaw,
Of Counsel for Petitioner
116 Pryor St., S.W.
Atlanta, Georgia 30303

PETITIONER'S EXHIBIT A

WATTS V. TEAGLE ET AL, 124 Ga. App. 726

EBERHARDT, Judge. Watts obtained from the Trustees of the Avondale United Methodist Church an option to purchase its church and church lot, for which he paid a stated consideration. By its terms the option expired 180 days from its date, if not previously exercised or extended, when it should "become void and of no force and effect."

The optionee sought to sell the property during the term, and he alleges that by advertising and other efforts he procured several interested prospective purchasers. Some of the prospects went by to inspect the property, and appellant asserts that these were discouraged from buying for that while making the inspection the optionor's minister informed them as to the terms of the option - that is, the price to be paid and the time within which the option was to be exercised, leading them to believe that by waiting they could procure the property for less than appellant offered it and depriving him of the opportunity to make the sales.

Watts sued the church trustees and the minister, charging that they had conspired to chill the prospects and prevent the sales. He also alleged that prior to its expiration he had given written notice of his election to exercise the option, as the option required.

Defendants moved for summary judgment, and upon the hearing it appeared that Watts had written a letter to the trustees 181 days after the date of the option, asserting that he was arranging a loan that would enable him to exercise the option and asked that it be extended, which they were unwilling to do. Summary judgment was granted on motion of the defendants and plaintiff appeals. Held:

1. We agree with the trial judge in his order that there was no issue of material fact, and the matter was appropriate for summary judgment.

2. When summary judgment is appropriate the parties are not entitled to a jury trial, which is reserved for instances when there is an issue of material fact to be determined.

3. Appellant does not contend, and it does not appear that the optionors took any action or did anything to prevent him from exercising his right to purchase the property in accordance with the terms and provisions of the option. The charge of conspiracy against the optionors relates only to their alleged conduct in disclosing to optionee's prospective purchasers the terms of the option and leading them to believe that they might acquire the property on the same terms simply by waiting until the option had expired (which optionors deny). Assuming this to be true, the option contract did not extend to appellant any right to sell the property prior to his exercise of the option. It was not a listing of property with a real estate agent or broker for sale. It was simply an option to purchase, which he might have exercised on any date within the terms of 180 days. We know of no provision of law under which it is declared to be a fraud for any party to an option contract to reveal to other persons the terms of the outstanding option. It is simply a matter of business judgment for them to make as to whether it may be wise or foolish to do it. We are not authorized to declare the action to be unlawful merely because it may have been unwise or foolish. Folly is not fraud, nor does it amount to a conspiracy. *Equitable Loan &c. Co. v. Waring, 117 Ga. 599 (3) (44 SE320, 62 LRA 93, 97 ASR 177).* Exercise of the option by appellant was sine qua non to the arising of further rights in his favor.

4. Appellant asserts that he gave written notice on August 19, 1970, of his election to exercise the option, which had been executed and dated February 19, 1970, and which was for a term of 180 days. Assuming that the letter was otherwise sufficient to serve as a written notice of his election to exercise the option, it came one day after expiration of the term and was ineffective. *Code Ann Sec. 102-102 (8); First Nat. Bank of Atlanta v. Mann, 211 Ga. 706 (88 SE2d 361).*

We find no error in the granting of defendants' motion for summary judgment, and it is Affirmed. Hall, P. J., and Deen, J., concur. Whitman, J., not participating.

ARGUED JUNE 4, 1971 - DECIDED OCTOBER 21, 1971.

Rehearing Denied October 29, 1971 - Cert. Applied for.

Action on contract. DeKalb Superior Court. Before Judge Thibadeau.

E. B. Shaw, for appellant.

Edward D. Wheeler, D. E. Williams, for appellees.

PETITIONER'S EXHIBIT B

26951
SUPREME COURT OF GEORGIA

Atlanta, December 1, 1971

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered: Earl L. Watts v. Winton Teagle et al.

Upon consideration of the application for certiorari filed to review the judgment of the Court of Appeals in this case, it is ordered that the writ be hereby denied. All the Justices concur.

BILL OF COSTS, $100.00

SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE, ATLANTA

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia, and that

paid the above bill of costs.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

Case No.
Court of Appeals of Georgia

REMITTITUR FROM SUPREME COURT

Filed in office

Clerk Court of Appeals of Georgia.

PETITIONER'S EXHIBIT C

26951
SUPREME COURT OF GEORGIA

Atlanta, December 17, 1972

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Earl L. Watts v. Winton Teagle et al.

Upon consideration of the motion for a reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA,
CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

PETITIONER'S EXHIBIT D

46264
COURT OF APPEALS
OF THE STATE OF GEORGIA

ATLANTA, December 30, 1971

The Honorable Court of Appeals met pursuant to adjournment. The following order was passed:

E. L. Watts v. Winton Teagle et al.

Pursuant to motion, it is ordered that the remittitur in this case be stayed pending application to the Supreme Court of the United States for the writ of certiorari.

COURT OF APPEALS OF THE STATE OF GEORGIA
CLERK'S OFFICE, ATLANTA

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

PETITIONER'S EXHIBIT E

STATE OF GEORGIA)
) SS.
COUNTY OF DeKALB)

OPTION

THIS AGREEMENT AND OPTION entered into this 19th day of February, 1970, by and between the undersigned members of the Board of Trustees of the Avondale United Methodist Church, DeKalb County, State of Georgia, hereinafter referred to as Seller, and EARL L. WATTS, hereinafter referred to as Buyer,

WITNESSETH:

1.

That for the sum of Two Thousand Dollars ($2,000.00) cash in hand paid, the receipt of which is hereby acknowledged by Seller, and other good and valuable consideration referred to hereinafter, the Seller hereby grants, bargains, sells and conveys unto Buyer, his heirs and assigns, the exclusive option to purchase from Seller, the following described real estate:

All that tract or parcel of land lying and being in Land Lot 250 of the 15th District of DeKalb County, Georgia, and being more particularly described as follows: BEGINNING at the intersection of the south side of Wells Street and the east side of Laredo Place and running thence east along the curvature of Wells Street 751.4 feet to a point, said point; being located at the intersection of the south side of Wells Street and the west side of Hobbs Street; thence southwesterly along the west side of Hobbs Street 481.6 feet to a point, said point being located at the intersection of the north side of North Clarendo Street and the west side of Hobbs Street; thence west along the north side of North Clarendo Street 632.0 feet to a point; thence north 63.1 feet to a point; thence northwesterly 139.5 feet to a point on the east side of Laredo Place; thence north along the east side of Laredo Place 472.5 feet to the point of beginning.

2.

Buyer, in consideration for this option and regardless of whether this option is exercised, also agrees to paint the exterior of Avondale United Methodist Church, consisting of two buildings. It is further agreed and understood that the quality of paint to be used as well as the quality of workmanship employed shall be to the satisfaction and approval of the Board of Trustees of the Church; and that Buyer shall furnish both the paint and the labor and pay all costs thereof and incidental thereto.

3.

The total purchase price of said property shall be One Hundred Fifty Thousand Dollars ($150,000.00), to be paid in cash by Buyer if this option is exercised. The Two Thousand Dollars ($2,000.00) previously paid by the Buyer shall not be applied as a credit against the purchase price.

4.

This option shall expire at midnight one hundred and eighty (180) days from the date this option is executed, if not exercised or extended before that time, and it shall become void and of no force and effect.

5.

Time is of the essence of this option.

6.

This option is to be exercised by written notice by the Buyer to the Seller of its intention to purchase from Seller.

7.

If this option is exercised as herein provided, Seller agrees to furnish good and marketable title to said property and to convey said property by warranty deed to Buyer at the time sale is consummated. Buyer shall have a reasonable time in which to examine title to said property. If Buyer finds any legal defects to title, Seller shall be furnished with a written statement thereof and given a reasonable time in which to correct same. It is agreed that such papers that may be legally necessary to carry out the terms of this sale shall be executed and delivered by the parties at interest as soon as the validity of the title to said property has been established.

8.

The time and place of closing said transaction shall be set by attorneys for the Buyer and shall be set within thirty (30) days of the exercise of this option providing, however, such time is not extended by virtue of any necessity for title correction.

9.

If this option is exercised as herein provided, real property taxes for the current year shall be prorated as of the said date of closing.

10.

Seller warrants and represents that it has the authority to grant this option and that it now holds the title to said property.

11.

This contract and option is binding upon the heirs, assigns and administrators of the Seller and the Buyer.

IN TESTIMONY WHEREOF, the parties hereunto set their hands and affixed their seals the day and year first above written.

Signed, sealed and delivered in the presence of:

Sgd. Dewey Brown, Jr.
Witness

Sgd. Jeanette O. Farrar
Notary Public
My Comm. expires 3-12-71

SELLER:

Sgd. Odell Clements (SEAL)
Member, Board of Trustees
Avondale United Methodist Church

Signed, sealed and delivered in the presence of:

Sgd. Mrs. Odell Clements
Witness

Sgd. Jeanette O. Farrar
Notary Public
My Comm. expires 3-12-71

Sgd. W. H. O'Kelley (SEAL)
Member, Board of Trustees
Avondale United Methodist Church

Signed, sealed and delivered
in the presence of:

Sgd. Leonard M. Duke
Witness

Sgd. Jeanette O. Farrar
My comm. expires 3-12-71

Sgd. Winton Teagle (SEAL)
Member, Board of Trustees
Avondale United Methodist
Church

BUYER:

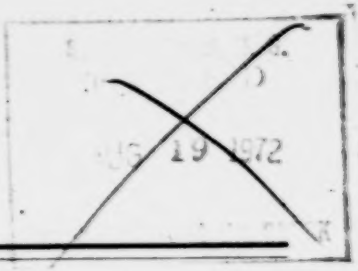
Signed, sealed and delivered
in the presence of:

Sgd. Dewey Brown, Jr.
Witness

Sgd. Jeanette O. Farrar
Notary Public
My comm. expires 3-12-71

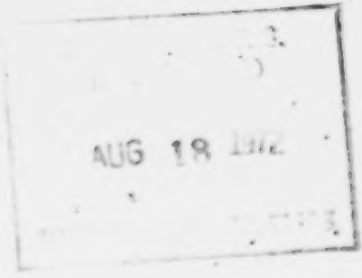
Sgd. Earl L. Watts (SEAL)
EARL L. WATTS

LIBRARY
SUPREME COURT, U. S.



Supreme Court of the United States

OCTOBER TERM, 1971



NO. 71-1379

EARL L. WATTS,

Petitioner in Certiorari

vs.

WINTON TEAGLE ET AL.,

Defendants in Certiorari

PETITION OF EARL L. WATTS FOR REHEARING ON ORDER OF JUNE 19, 1972, DENYING HIS PETITION FOR WRIT OF CERTIORARI.

G. SEALS AIKEN,
Attorney for Petitioner,
Suite 1626 Candler Bldg.,
Atlanta, Georgia 30303

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-1379

EARL L. WATTS,

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vs.

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Defendants in Certiorari

PETITION OF EARL L. WATTS FOR REHEARING ON ORDER OF JUNE 19, 1972, DENYING HIS PETITION FOR WRIT OF CERTIORARI.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Earl L. Watts files this his petition for rehearing on the order of June 19, 1972 of this Court denying his petition for writ of certiorari to the Court of Appeals of Georgia for the purpose of having reviewed, corrected, and reversed, the decision and judgment of that court of October 21, 1971 (Watts vs. Teagle, et al. 124 Ga. App. 726) affirming the summary judgment of Judge Richard A. Thibadeau of the Superior Court of DeKalb County, Georgia for the defendants in his action for damages for fraud and deceit practised upon him by the defendants.

Honorable Lewis F. Powell, Jr., Associate Justice of this Court, granted to petitioner on June 27, 1972 an extension of time to and including August 21, 1972 in which to file a petition for rehearing on said order of June 19, 1972 denying his petition for a writ of certiorari to the Court of Appeals of Georgia.

The decision of the Court of Appeals of Georgia of October 21, 1971 affirming the summary judgment of Judge Richard A. Thibadeau of the Superior Court of DeKalb County, Georgia for the defendants in petitioner's said action for damages for fraud and deceit practised upon him by the defendants, unless reversed by this court, will deprive petitioner of his property to the extent of the amount sued for by him, by depriving him of due process of law and of equal protection of the law granted to other persons in like circumstances and similar situations in violation of Article I, Section I, Paragraphs I, II, III, IV, and XXIII and Article VI, Section XVI, Paragraph I of the Constitution of Georgia as applied to Georgia by Section I of Amendment XIV of the United States Constitution, and in violation of Amendment V of the U.S. Constitution as applied to the States by Section I of Amendment XIV thereof, in the following particulars:

1. In upholding Judge Richard A. Thibadeau in arbitrarily and capriciously rendering, in violation of Section I of Amendment XIV of the U.S. Constitution, the summary judgment on March 18, 1971 in favor of the defendants and in dismissing petitioner's complaint as amended, when the pleadings of the parties and affidavits submitted by petitioner presented questions of fact for the exclusive determination of a jury under Article VI, Section XVI, Paragraph I of the Georgia Constitution as applied to the State of Georgia by Section I of Amendment XIV of the U.S. Constitution.

2. In upholding Judge Richard A. Thibadeau in arbitrarily and capriciously depriving petitioner of due process of law and of equal protection of the law granted to other persons in like circumstances and similar situations by depriving him of a jury trial of all questions of fact presented by the pleadings and affidavits in the case, in violation of Article VI, Section XVI, Paragraph I and Article I, Section I, Paragraphs I, II, III, IV, and XXIII of the Georgia Constitution and Section I of Amendment XIV of the U.S. Constitution.

3. In upholding Judge Richard A. Thibadeau in exercising at the same time legislative, judicial, and executive powers of the State of Georgia in violation of Article I, Section I, Paragraph XXIII of the Georgia Constitution as applied to the State of Georgia by Section I of Amendment XIV of the U.S. Constitution, in granting a summary judgment for the defendants and in dismissing the complaint of petitioner as amended, when the facts and circumstances shown by the pleadings and affidavits presented questions of fact for the exclusive determination of a jury under Article VI, Section XVI, Paragraph I of the Georgia Constitution as applied to the State of Georgia by Section I of Amendment XIV of the U.S. Constitution.

4. In upholding Judge Richard A. Thibadeau in not holding that the pleadings of the parties and affidavits submitted by petitioner presented questions of fact and circumstances as to whether the defendants had conspired and successfully acted to prevent petitioner from exercising his option to purchase the property described in said option after inducing him to make substantial improvements thereon at his expense with the deliberate intention of preventing him from exercising said option, thereby depriving him of his property in the amount sued

for in violation of Article VI, Section XVI, Paragraph I and Article I, Section I, Paragraphs I, II, III, IV, and XXIII of the Georgia Constitution as applied to the State of Georgia by Section I of Amendment XIV of the U.S. Constitution, and in violation of Amendment V of the U.S. Constitution as applied to Georgia by Section I of Amendment XIV thereof.

The argument amplifying the reasons relied on for the allowance of the writ of certiorari and the authorities supporting the same are set forth on pages 10 through 19 of the petition for certiorari and will not be repeated here, but special attention is invited thereto.

Petitioner filed a verified complaint in the Superior Court of DeKalb County, Georgia on August 19, 1970 against the defendants in two counts for injuries and damages. In Count I he alleged that the defendants had injured and damaged him in the sum of $179,500.00 by conspiring and successfully acting to prevent him from exercising his option to purchase the Avondale United Methodist Church Property described in his said option. In Count II he alleged that the defendants were guilty of deliberage, fraudulent, and deceitful acts toward him with the intention of defrauding him, and which did defraud him by preventing him from exercising his option to purchase said property. He sued under Count II for general damages in the amount of $175,000.00; $4,500.00 for improvements made by him on said property; $5,000.00 for attorney's fees and $25,000.00 punitive damages.

On September 25, 1970 the defendants filed a motion for summary judgment in their behalf.

Petitioner filed a verified amendment to his complaint on October 26, 1970, in which he alleged in part and in substance as follows:

COUNT I

Beginning in March, 1970 and continuing through the remaining period of the option, the defendants deliberately refused to allow petitioner to exercise his option by refusing to allow him to purchase the property involved for the sale price specified in said option.

COUNT II

The defendants from time to time from March, 1970 through August 19, 1970 acted in concert with each other in preventing petitioner from exercising his option by refusing to convey said property to him for the purchase price specified therein. They are guilty, individually and collectively, of fraud and deceit toward petitioner in that they accepted $2,000.00 from him for the option and allowed him to spend over $2,500.00 in improving the property, and over $1,000.00 in advertising the same for sale, when they knew they did not intend to allow him to purchase the property for the purchase price of $150,000.00 specified in said option and intended instead to prevent him from doing so and to prevent him from selling said property to customers ready, willing, and anxious to buy the same, which he produced from time to time, beginning in March, 1970 and extending through the remainder of the period of said option. The improvements petitioner made on said property greatly increased its value and intensified the efforts of the defendants to prevent petitioner from exercising his option to purchase the property or to sell it during the period of said option. Plaintiff seeks and is entitled to the sum of $175,000.00 general damages, $2,000.00 for the amount he paid for the option, $2,500.00 for the cost of improvements made on said property, $1,000.00 for advertising the property, $25,000.00 for expenses of litigation, including attorney's fees, and $50,000.00 punitive damages. The defendants have acted in bad faith toward petitioner and as the result thereof he is entitled,

to recover from them all expenses of litigation, including counsel fees, which will amount to at least $25,000.00. He seeks and is entitled to recover said punitive damages by reason of the aggravating circumstances, either in the acts or the intentions of the defendants, to either deter them from repeating their said trespass or as compensation for the wounded feelings of the plaintiff.

On March 11, 1971 petitioner filed a motion to dismiss the motion of defendants for summary judgment in their behalf and attached thereto as his Exhibits A and B affidavits from Judson B. Ackerman and Leonard M. Duke supporting the allegations in his verified petition as amended. He contended in said motion that the grant of a summary judgment to the defendants would violate Amendments V and IX of the U.S. Constitution as applied to the States by Section I of Amendment XIV thereof.

Judge Thibadeau stated in his order granting summary judgment for defendants and in dismissing the complaint of petitioner, that he "considered the pleadings, requests for genuineness of documents and admission of facts in plaintiff's answer thereto, the affidavits and other matters in support of and in opposition of the motion (of the defendants for summary judgment) AND AFTER HEARING ORAL ARGUMENTS THEREON, the court is of the opinion that there is no genuine issue as to any material fact and defendants are entitled to a judgment as a matter of law." (Capitals added).

However, JUDGE THIBADEAU ARBITRARILY AND CAPRICIOUSLY REFUSED TO ALLOW MR. E.B. SHAW AS ATTORNEY FOR PETITIONER TO READ HIS MOTION TO DISMISS THE MOTION OF DEFENDANTS FOR SUMMARY JUDGMENT OR TO ARGUE THE PLEADINGS AND AFFIDAVITS IN OPPOSITION TO SAID MOTION OF DEFENDANTS.

It is very obvious from the excerpts presented in the petition for certiorari from the pleadings and affidavits before judge Thibadeau that there was both positive and circumstantial evidence requiring the exclusive consideration of a jury under Article VI, Section XVI, Paragraph I of the Georgia Constitution as applied to Georgia by Section I of Amendment XIV of the U.S. Constitution, and which would have authorized a jury to find that petitioner had been arbitrarily, capriciously, unjustly, and illegally prevented by overt and concerted acts of the defendants from exercising his option to purchase the property involved, pursuant to a conspiracy formed by them after petitioner paid for said option and made substantial improvements on the property.

The decision of the Court of Appeals of Georgia of October 21, 1971 affirming the order of Judge Thibadeau of DeKalb Superior Court granting a summary judgment for the defendants and dismissing petitioner's complaint as amended is IN DIRECT CONFLICT WITH THE DECISION OF THIS COURT IN *Hickman vs. Taylor, 329 U.S. 495, 67 S.Ct. 385, 388,* holding that "THE NEW RULES * RESTRICT THE PLEADINGS TO THE TASK OF GENERAL NOTICE-GIVING AND INVEST THE DEPOSITION-DISCOVERY PROCESS WITH A VITAL ROLE IN THE PREPARATION FOR TRIAL. * * * ."

Petitioner was entitled under the facts alleged in his verified petition as amended and in the affidavits submitted in support thereof and the decision of this Court in *Hickman vs. Taylor, 329 U.S. 495,* TO PROCEED WITH DISCOVERY PROCEEDINGS IN PREPARATION FOR TRIAL ON THE MERITS OF THE CASE BEFORE A JURY UNDER ARTICLE VI, SECTION XVI, PARAGRAPH I OF THE GEORGIA CONSTITUTION AS APPLIED TO GEORGIA BY SECTION I OF AMENDMENT XIV OF THE U.S. CONSTITUTION.

The Supreme Court of Georgia in *Reynolds vs. Reynolds, 217 Ga. 234, 246, 123 S.E.2nd 115*, followed and quoted from *Hickman vs. Taylor, 329 U.S. 495*, and also followed it in *Byrd vs. Ford Motor Co. et al, 118 Ga. App. 333*, holding that "A petition SHOULD NOT BE DISMISSED FOR FAILURE TO STATE CLAIM UNLESS IT APPEARS BEYOND DOUBT THAT THE PLAINTIFF CAN PROVE NO SET OF FACTS IN SUPPORT OF HIS CLAIM WHICH WOULD ENTITLE HIM TO RELIEF." It was followed in *Bell vs. Atlanta Cooperage Co., Inc. et al. 121 Ga. App. 207*, holding that "a complaint should not be dismissed unless the averments disclose WITH CERTAINTY that the plaintiff would not be entitled to relief under ANY state of facts which could be proved in support of such claim." (Capitals added).

Petitioner's complaint was dismissed by Judge Thibadeau WITHOUT ANY EVIDENCE WHATEVER IN OPPOSITION THERETO, WITHOUT ALLOWING PETITIONER TO CONDUCT ANY DISCOVERY PROCEEDINGS WHATEVER, AND WITHOUT A TRIAL BY A JURY OF THE ISSUES OF FACT PRESENTED BY THE COMPLAINT OF PETITIONER AS AMENDED AND AFFIDAVITS SUBMITTED BY HIM IN OPPOSITION TO THE MOTION OF DEFENDANTS FOR A SUMMARY JUDGMENT.

The decision of the Court of Appeals of Georgia in affirming said arbitrary and capricious ruling of Judge Thibadeau, unless reversed by this court, will deprive petitioner of his property to the extent of the amount sued for by him, without Due Process of Law and Without Equal Protection of the Law granted to other persons in like circumstances and similar situations, in violation of Article I, Section I, Paragraphs I, II, III, IV, and XXIII and Article VI, Section XVI, Paragraph I of the Georgia Constitution, and Section I of Amendment XIV of the U.S. Constitution as applied to Georgia.

Ga. Code Section 81A-156, dealing with Summary Judgments and which is applicable to this case under Section I of Amendment XIV of the U.S. Constitution, provides in sub-paragraph (c): "BUT NOTHING IN THIS SECTION SHALL BE CONSTRUED AS DENYING TO ANY PARTY THE RIGHT TO TRIAL BY JURY WHERE THERE ARE SUBSTANTIAL ISSUES OF FACT TO BE DETERMINED."

The verified pleadings of petitioner and affidavits submitted by him in support thereof and in opposition to the motion of the defendants for a summary judgment, and the authorities presented in this petition for rehearing show beyond question that petitioner HAS BEEN DEPRIVED OF HIS DAY IN COURT by the Court of Appeals of Georgia in affirming Judge Thibadeau in arbitrarily and capriciously refusing to allow his counsel to make any oral argument or to conduct any discovery proceedings or to present or cross-examine any witnesses or to try his case to a jury as provided by Article VI, Section XVI, Paragraph I of the Georgia Constitution as applied to Georgia by Section I of Amendment XIV of the U.S. Constitution. As held by this Court in *Hovey vs. Elliott et al, 167 U.S. 409, 17 S.Ct.844-5*, "It is a rule as old as the law, and never more to be respected than now, that NO ONE SHALL BE PERSONALLY BOUND UNTIL HE HAS HAD HIS DAY IN COURT, by which is meant until he has been duly cited to appear, AND HAS BEEN AFFORDED AN OPPORTUNITY TO BE HEARD. Judgment without such citation and OPPORTUNITY

WANTS ALL THE ATTRIBUTES OF A JUDICIAL DETERMINATION. IT IS JUDICIAL USURPATION AND OPPRESSION, AND CAN NEVER BE UPHELD WHERE JUSTICE IS JUSTLY ADMINISTERED. * * * A DENIAL TO A PARTY OF THE BENEFIT OF A NOTICE WOULD BE, IN EFFECT, TO DENY THAT HE IS ENTITLED TO NOTICE AT ALL, AND THE SHAM AND DECEPTIVE PROCEEDING HAD BETTER BE

OMITTED ALTOGETHER. IT WOULD BE LIKE SAYING TO A PARTY, 'APPEAR AND YOU SHALL BE HEARD:' AND, WHEN HE HAS APPEARED, SAYING, 'YOUR APPEARANCE SHALL NOT BE RECOGNIZED, AND YOU SHALL NOT BE HEARD.' In the present case, the district court not only, in effect, said this, but immediately added a decree of condemnation, reciting that the default of all persons had been duly entered. IT IS DIFFICULT TO SPEAK OF A DECREE THUS RENDERED WITH MODERATION. IT WAS, IN FACT, A MERE ARBITRARY EDICT, CLOTHED IN THE FORM OF A JUDICIAL SENTENCE. THIS LANGUAGE BUT EXPRESSES THE MOST ELEMENTARY CONCEPTION OF THE JUDICIAL FUNCTION." (Capitals added).

We are told in Acts 22 that when St. Paul was being mobbed and persecuted without any justification or hearing, the following occurred: "And they gave him audience unto this word, and then lifted up their voices, and said, Away with such a fellow from the earth, for it is not fit that he should live. And as they cried out, and cast off their clothes, and threw dust into the air, The Chief Captain commanded him to be brought into the castle, and bade that he should be examined by scourging; that he might know wherefore they cried so against him. And as they bound him with thongs, Paul said unto the centurion that stood by, Is it lawful for you to scourge a man that is a Roman, and uncondemned? When the centurion heard that, he went and told the Chief Captain, saying, Take heed what thou doest for this man is a Roman. Then the Chief Captain came, and said unto him, Tell me, art thou a Roman? He said, Yea. And the Chief Captain answered, With a great sum obtained I this freedom. And Paul said, BUT I WAS FREE BORN. Then straightway they departed from him which should have examined him, and the Chief Captain also was afraid, after he knew that he was a Roman, and because he had bound him."

Petitioner in this case IS A FREE BORN CITIZEN OF THE UNITED STATES OF AMERICA AND IS ENTITLED TO ALL THE PRIVILEGES AND IMMUNITIES GUARANTEED TO HIM IN SAID CAPACITY UNDER THE CONSTITUTIONS OF GEORGIA AND THE UNITED STATES, AND WHICH HAVE BEEN ARBITRARILY AND CAPRICIOUSLY DENIED HIM BY JUDGE THIBADEAU AS AFFIRMED BY THE COURT OF APPEALS OF GEORGIA.

WHEREFORE, Petitioner earnestly and urgently appeals to this Honorable Court to grant this petition for a rehearing on its order of June 19, 1972 denying his petition for writ of certiorari and that it now grant said writ to the Court of Appeals of Georgia to review, correct, and reverse its decision of October 21, 1971 affirming the arbitrary, capricious, and unjust judgment of Judge Thibadeau of DeKalb Superior Court of March 18, 1971 DEPRIVING PETITIONER OF HIS DAY IN COURT IN GROSS VIOLATION OF SECTION 1 OF AMENDMENT XIV OF THE U.S. CONSTITUTION.

Respectfully submitted,

G. SEALS AIKEN,
Attorney for Petitioner

1626 Candler Bldg.,
Atlanta, Ga. 30303

E. B. SHAW,
Of Counsel for Petitioner

CERTIFICATE OF COUNSEL

The foregoing petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58 of the Supreme Court of the United States.

This the _____ day of _____, 1972.

_____

G. SEALS AIKEN,
Attorney for Petitioner

_____

EDGAR B. SHAW
Of Counsel for Petitioner

CERTIFICATE OF SERVICE

This is to certify that I have this day served the defendants in the foregoing petition for rehearing by sending a copy of the same by first-class mail to Edward D. Wheeler, Esq. and O.E. Williams, Esq., 807 First National Bank Bldg., Decatur, Ga. 30030, counsel of record for said defendants.

This the _____ day of _____, 1972.

_____

G. SEALS AIKEN,
Attorney for Earl L. Watts